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In the Supreme Court of the United States

THE STATES OF OHIO AND INDIANA, Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS OHIO AND INDIANA

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EPA FAILED TO CONSIDER AIR QUALITY FACTORS AS REQUIRED BY SECTIONS 110(a)(2)(D)(i)(I) AND (k)(5) OF THE CLEAN AIR ACT IN MAKING THE NOx SIP CALL

EPA wrongly criticizes Petitioners for a "mistaken characterization of the manner in which EPA considered costs in the [NOx SIP call] rulemaking." EPA Brief in Opposition ("EPA Opp.") at 10. Petitioners Ohio and Indiana do not dispute, and recognized in their brief, Ohio Pet. 4, that EPA used air quality modeling to identify the 23 States *included* in the NOx SIP Call rule. Even EPA claims a focus on air quality only as "the principal basis" for determining a State's "*inclusion* in the SIP Call." EPA Opp. 10. (Emphasis added.)

But including a State in the NOx SIP Call, and thus imposing some additional controls, differs substantially from determining the amount of a particular State's "significant contribution" to downwind nonattainment and the measures "necessary" to adequately mitigate the offending downwind pollution.[1] EPA's discussion of its use of air quality factors fails to fully emphasize that EPA abandoned consideration of air quality factors in favor of cost effectiveness in making the critical "significant contribution" and "necessary mitigation" determinations under Sections 110(a)(2)(D)(i)(I) and 110 (k)(5).

EPA used air quality factors to identify myriad linkages between various upwind and downwind States, and, above some "very low threshold," 213 F.3d 663, at 675, determined that 23 States should be required to

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[1] *See also* 63 Fed. Reg. at 57381, where, in discussing its use of its multifactor test to identify "covered states," EPA carefully distinguished its finding that upwind State emissions were "significant" in that they are sufficiently large to warrant requiring controls for that State (*i.e.*, large enough to include the State in the SIP Call) from the "actual finding of significant contribution," which "applies only to the portion of the State's emissions for which EPA has identified highly cost-effective controls."

revise their state implementation plans (SIPs). But EPA failed to use the information it generated on air quality factors to finish its statutorily-mandated task.

Congress mandated that state implementation plans contain adequate provisions prohibiting emissions from "contributing significantly" to nonattainment of National Ambient Air Quality Standards in downwind States, 42 U.S.C. 7410(a)(2)(D)(i)(I), and authorized EPA to require plan revisions only "as necessary to correct" plan inadequacies. 42 U.S.C. 7410(k)(5). EPA never identified in air quality terms the significant contribution of each State so that the State could assess the necessary actions to correct the inadequacy. As dissenting Judge Sentelle asked: under this statutory mandate, "what should EPA look for as being contributed significantly? Congress clearly answered that question for the agency as being the 'amount' of an 'air pollutant.'" 213 F.3d at 696. Instead, EPA used the blunt instrument of a one-size-fits-all, $2,000-per-ton cost-effectiveness standard, which had the effect of disregarding the variable nature of the linkages, rather than addressing them. EPA did not follow the statutory mandate.

Consequently, EPA has also disregarded the principles of cooperative federalism embodied in the Clean Air Act. EPA acknowledges that the Clean Air Act "makes 'the States and the Federal Government partners in the struggle against air pollution.'" EPA Opp. 3, citing *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). EPA's one-size-fits-all cost-effectiveness approach makes States not so much partners as functionaries. EPA's approach makes the unit of the State largely irrelevant in defining the actual significant contribution of ozone and in defining its cure. The approach obliterates the State's ability to gauge and address its relative share of the downwind pollution it is causing. State boundaries serve only as *ad hoc* dividing lines for apportioning the $2000-per-ton common solution.

Faced with an alleged linkage of ozone transport to Western Pennsylvania, Ohio might, for example, use air

quality data and modeling to fashion a mitigation scheme that focuses upon NOx-emitting sources along the Ohio River.[2] Whether the resulting scheme would cost more or less than $2000 a ton in air pollution controls when added to the costs of additional control plans to address alleged linkages to other downwind States, the State of Ohio is nonetheless addressing what modeling shows is *its* air quality contribution. Contrary to the statute, the one-size-fits-all cost approach makes the State's pollution contribution irrelevant above the initial NOx SIP Call inclusion thresholds.

EPA states that it "found that the non-uniform approaches provided no significant advantages over the uniform approach, in terms of either air quality or cost. . . ." EPA Opp. 17. That does not justify choosing a uniform approach over a non-uniform approach when the statute clearly favors the latter. Indeed, EPA's finding indicates that there should be no air-quality or cost impediment to a non-uniform approach.

Nor should the fact that upwind States contribute in varying degrees to numerous downwind States justify the implication that everything "evens out," so the one-size-fits-all cost approach is reasonable. Petitioners Ohio and Indiana noted the inequity in the fact that Pennsylvania contributes to 18 percent of the amount of ozone pollution in New York above the national standard, while Indiana contributes only one percent, yet both must reduce emissions pursuant to the $2,000-per-ton standard. Ohio Pet. 12. Respondent States New York, *et al.*, counter that, among other linkages, Indiana contributes, for example, an average of 17 percent of the ozone in Louisville while Pennsylvania contributes less

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[2] Of course, this example may be purely hypothetical, as EPA has proposed to determine that the Pittsburgh-Beaver Valley Ozone Nonattainment Area and the Lancaster Ozone Nonattainment Area have attained the 1-hour ozone National Ambient Air Quality Standard. 66 Fed. Reg. 1925 (Jan. 10, 2001).

than one percent. However, simply comparing percentages at different downwind areas can mask the varying magnitudes of the problem in the downwind areas receiving the pollution. The ozone problem in New York is greater than the ozone problem in Louisville. This is shown by the comparative numbers of "grid hours" of ozone exceedances, an input in EPA modeling and a rough measure of the severity or extent of the ozone problems in a downwind "receptor area."[3] For a period modeled by EPA, New York had 1,924 grid hours of exceedances and Louisville had 166 grid hours. *Air Quality Modeling Technical Support Document for the NOx SIP Call*, U.S. EPA, Office of Air and Radiation, Sept. 23, 1998, at p. I-13, I-17. Joint Court of Appeals Appendix of Industry Petitioners, Vol. 3, 1048, at 1350, 1354. By this measure, 18 percent of New York's ozone problem is a larger contribution than 17 percent of Louisville's ozone problem. EPA's uniform cost approach improperly amalgamates all these variations and denies a State the opportunity to comply with the "good neighbor" provision in a way commensurate with its contribution of pollutants to downwind States.

EPA's disregard of State-to-State variations in imposing the single $2,000-per-ton cost-effectiveness standard also cannot be excused on the basis of economic fairness. Contrary to EPA's claim, EPA Opp. 13, the statutory mandates of Sections 110(a)(2)(D)(i)(I) and (k)(5) do not identify economic fairness as a factor that should be considered by EPA to "equally distribute the burdens borne by all the States"; at least, it should not be considered in disregard of the States' relative contributions of downwind pollutants. Nor do the quoted

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[3] For modeling purposes, downwind receptor areas are divided into grids. Ozone exceedances for each grid square are tallied for the receptor area for a given period. A higher number of "grid hours" over a period indicates an ozone problem in an area that covers a larger area, or is more frequent, or both, when compared to an area with a smaller number.

passages from the legislative history support such a position. EPA Opp. 13, n. 10. The passage noting the need to "equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State," ties the responsibility for pollution control to the extent of pollution contributed. It does not suggest that costs be equalized regardless of the amount of pollution caused.

In sum, EPA's one-size-fits-all cost-effectiveness standard is not a reasonable application of Sections 110(a)(2)(D)(i)(I) and (k)(5). These Sections do not allow EPA to abandon so early and so completely the consideration of air quality factors in favor of a cost-effectiveness standard. When a statute includes an express factor, EPA must give that factor the greatest weight in interpreting the statute. *Natural Resources Defense Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987). Under the Section 110 mandates, EPA's first concern must be to define how much contribution of ozone from a State to a downwind State's nonattainment is "significant," *i.e.*, too much. The necessary mitigation required should be proportionate to that significant amount contributed. Petitioners Ohio and Indiana do not object to considering cost as a secondary factor, as when EPA assesses the adequacy of a revised SIP developed to reduce interstate NOx emissions. Cost should not be considered either in place of air quality factors or before "significant contribution" is first determined using air quality factors and the amount of pollution contributed.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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